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IN THE

Supreme Court of the United States

October Term 1947

No. 258

ALBERT E. SCHWABACHER, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

The issue in this case is whether, in approving a privately formulated plan for the acquisition of the Pere Marquette Railroad by the Chesapeake & Ohio Railroad through the exchange of stock of the latter for that of the former, the Interstate Commerce Commission properly held itself to be *without* jurisdiction to determine whether the full prior equity of dissenting preferred shareholders in Pere Marquette had been satisfied in the exchange—despite the fact that the statute under which the Commission was acting expressly provides that its jurisdiction in such cases shall be not only "exclusive" but "plenary."

Motions to affirm have been filed by the Government (United States and Interstate Commerce Commission) and

the carriers (Chesapeake & Ohio Railway Company and Allegheny Corporation). The former states the issue and merely asserts, without argument, the correctness of the position taken by the Interstate Commerce Commission and the court below. The latter misrepresents the issue.

THE GOVERNMENT'S MOTION STATES NO GROUND FOR AFFIRMANCE

The motion of the United States and the Interstate Commerce Commission "submits" that the position of appellants "is without merit" because, it is said,

> It seems clear that the Commission can properly decline to arbitrate or adjudicate *private disputes* between dissenting stockholders or between the former and the corporation, where in the *judgment* of the Commission no considerations of *national transportation policy* are involved. (Emphasis supplied)

That there are here characteristics of a "private dispute" has no relevance if Congress intended and provided that the Interstate Commerce Commission should be, as it has said in the statute, the "exclusive and plenary" authority to determine the controversy. More often than not Congress has placed such controversies in the exclusive jurisdiction of federal administrative agencies. Examples are the National Labor Relations Board, Employees' Compensation Commission, and the Interstate Commerce Commission in such functions as the issuance of reparation orders or the approval of bankruptcy reorganization plans.

Nor, since it is undeniable that the Commission is the "exclusive" tribunal with "plenary" powers, does it lie in the "judgment" of the Commission to take or refuse jurisdiction, for the reason that Congress—which created the Commission and determines its jurisdiction and powers—has expressly provided otherwise. Moreover, here the Commission did *not* hold that its jurisdiction was merely discretionary but, on the contrary, that the issue

was absolutely "not within our province to decide". The Government motion takes the position that it is not "an inexorable obligation" of the Commission to take jurisdiction of such an issue in approving a merger plan in which the issue is embedded; but the Commission itself, on the contrary, has taken the position that it is its "inexorable obligation" *not* to take jurisdiction of that issue. In fact four views are presented:

(1) The Commission's view is that it is entirely without jurisdiction of such an issue. The Court below concurred.

(2) Appellants' contention is that the Commission has, as the statute states, "exclusive and plenary" jurisdiction of the issue.

(3) The Government's motion to affirm takes two different grounds. The first is to the effect that the Commission has a discretion in the matter. But even if the latter position were correct despite the unequivocal words of the statute, still the Commisison itself has assumed that it is wholly without discretion and hence the cause must be reversed in order that it shall exercise that discretion. *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 194; *Siegel Co. v. Trade Commission*, 327 U. S. 608, 614. *Cf. United States v. Carolina Carriers Corp.*, 315 U. S. 475, 488-489.

(4) The Government motion in another passage assumes, in addition to discretionary jurisdiction as to issues like the present one, that the absolute jurisdiction of the Commission attaches only to "issues involving transportation factors." But the statute does not so divide the subject, and the subject cannot practicably be so divided. The statute requires merger plans to be "just and reasonable." Like the words "fair and equitable" used in the Public Utility Holding Company Act, these words incorporate the principle of full priority to be accorded senior securities. *Cf. Otis & Co. v. Securities & Exchange Com-*

mission, 323 U. S. 624, 634. That "consensual arrangements" of primary interest to private parties are involved is immaterial. *Thompson v. Texas Mexican Ry. Co.*, 328 U. S. 134, 146-150. To disperse jurisdiction as to issues other than those in the vague category involving "transportation factors", would be impractical because the issues are inevitably interwoven as this Court held in the *Thompson* case, *supra*. Moreover, to disperse jurisdiction would not foster a national transportation policy looking toward the consolidation of carriers into regional systems because each consolidation would then require multiple drawn-out proceedings.

Other suggestions in the Government motion are either irrelevant or unfounded or both. Quoting the opinion of the court below, it is suggested that appellants here seek preferential treatment "quite apart from any merit in the grounds of dissent". That not only has never been the position of appellants but neither the Commission nor the court below has—despite appellants' urging—determined the merit of the grounds of dissent. The issue in these proceedings has always been whether the Commission or the court below *should* determine the merits; and each of them has declined to do so. The only significance of the word "dissenters" is that those who have dissented have preserved their rights, whereas assenters might be precluded from contesting the plan. What the court below intended by the above-quoted words appellants do not know, for the court below also went on to say:

> As we read the opinion of *the Commission*, it *did not attempt to pass upon what rights, if any, dissenting stockholders might have* under the laws of the several states. It specifically left Pere Marquette and Chesapeake & Ohio "free to settle controversies with dissenting stockholders through negotiation and litigation in the courts." *We adopt a like course.* Nothing in our opinion is to be interpreted as in any way determining, affecting or prejudicing these rights, whatever they may be. (Emphasis supplied.)

Moreover, at the argument of the case before the court below it was conceded that the issue was whether the prior equities of the dissenting stockholders of Pere Marquette should have been recognized in the exchange of stock provided under the plan of merger (Tr. pp. 52, 58, 77-85, 90). The Commission, the court below, and the appellees have simply taken the course of avoiding jurisdiction as to the merits on the ephemeral ground that some other tribunal in some other place and at some other time has it.

Again, the Government motion states that the Commission "carefully analyzed the proposed exchange ratio of Chesapeake & Ohio securities which were to supplant securities of the Pere Marquette" and quotes the ultimate conclusion of the Commission to the effect that the "proposed ratios of exchange * * * are just and reasonable". But the Commission expressly declined to inquire whether any class had been accorded its full priority for, as the Government motion concedes in the next paragraph, the Commission held only that its duty was "complete * * * when we make certain that all stockholders of the same class are treated alike". In other words, in the Commission's view, its jurisdiction falls short where a wrong is uniformly applicable to all members of a class of security holders although it might not be without jurisdiction if only part of the class were wronged. Certainly the statute makes no such esoteric division of jurisdiction. It is true that the dissenting holders of preferred stock in Pere Marquette are not treated any worse than the assenters and that, as the Government motion states, "thus the Commission undertook to prevent any discrimination against non-assenting minorities." But the question here is not whether dissenters were treated worse than assenters; but whether, since the dissenters have preserved their rights by not agreeing to the merger plan, they are entitled to have the Commission determine their rights and make appropriate provision therefor in supervising the merger.

It would serve no purpose here to explore prior decisions of the Commission as invited by the conclusion of the Government motion. Those decisions speak for themselves (see note 9 of the Statement of Jurisdiction). Moreover, the question here is a statutory one and, in that connection, it is to be noted that the words "exclusive and plenary" were not added to section 5 until the Transportation Act of 1940. Undoubtedly the real ground for the Commission's position rests upon ideas of administrative convenience or practicality but, if so, neither this Court nor appellants have been accorded the benefit of any form of statement of them. Even if stated they could hardly warrant a whittling down of the exclusive and plenary jurisdiction which the statute requires the Commission to assume and exercise.

To conclude—as does the Government motion—that the Commission "properly left Pere Marquette and Chesapeake & Ohio 'free to settle controversies with dissenting stockholders through negotiation and litigation in the courts' " is a bald and shocking departure from the conception of administrative jurisdiction which this Court has fostered even where statutes do not expressly provide for either "exclusive" or "plenary" administrative jurisdiction (see note 6 of the Statement of Jurisdiction). No supporting reasons are given for such a result. A partial rationale is suggested, distinguishing between "transportation factors" and others, but the Commission did not and could not make any such distinction. Had it done so it would not have been concerned about shareholders rights in any respect, whereas in fact it has considered all such matters except the issue presented by appellants. The Government motion therefore not only fails to show any ground for summary affirmance of the judgment below but the weakness of the case thus presented plainly discloses that this Court must reverse and remand the case to the Commission with directions to exercise its exclusive and plenary authority.

THE CARRIERS' MOTION CONFUSES THE ISSUE

The carriers' motion is a statement of false and irrelevant issues. Unlike the Government's motion and contrary to the fact, the carriers first assume that, respecting "matters of private right in the exercise of its responsibility under section 5(2) to see that the terms and conditions were 'just and reasonable', the Commission considered extensive evidence on that subject" (p. 3) and "considered appellants' contention in the light of the whole record" (p. 6). But beyond these unfounded assertions the carriers make no pretense that the Commission decided the merits of the controversy, nor had they done so at the oral argument in the court below (Tr. 52, 58, 77-85, 90). On the contrary even in their present motion they admit in stating the case that the issue was whether appellants are entitled to have their prior equity (par plus accumulations) recognized (p. 4).

Their first argument is that appellants insisted upon receiving "cash" rather than securities, whereas the oral argument cited above and the statement of jurisdiction (p. 5) make it plain that this was not the issue since appellants asked merely the satisfaction of their full priorities whether in cash or the equivalent securities. Yet the carriers' motion now insists that appellants seek "payment in cash" (pp. 4, 8, 9-10). The real purpose of this argument is apparently to bring into operation the so-called "appraisal statute" of the State of Virginia under which dissenters from a merger may seek appraisal of their shares and secure a cash payment (such statutes being common because securities of small corporations have no readily ascertainable market value so that exchanges in kind are impracticable). The purpose of the attempt to bring the case under the Virginia statute is because it may be that under Virginia law (as distinguished from Michigan law under which appellants' rights as shareholders arise) ac-

cruals of preferred dividends may be wiped out by the merger process (see the Statement of Jurisdiction, note 8). Appellees are so anxious to achieve this result that they have themselves instituted an appraisal action in the Virginia courts and are vigorously resisting removal proceedings. In their motion they ingenuously affirm that "there is no statutory provision in Michigan * * * for appraisal of dissenting stock in railroads" (p. 5), whereas the presence or absence of a special *statutory* remedy of appraisal in Michigan is immaterial since ordinary equity actions are there and elsewhere available to protect shareholders' interests. (See the public documents referred to in note 8 of the Statement of Jurisdiction as well as the Michigan statutes and cases referred to therein.) *The very existence of such opportunities for such misleading collateral judicial proceedings is one of the reasons why the exclusive and plenary jurisdiction of the Interstate Commerce Commission in such cases as these should not be dispersed.*

The second and equally irrelevant argument of the carriers is that appellants are demanding "some special and more favorable treatment for them because they were dissenting from the merger" (p. 4 and note 5) "by the mere fact of dissenting" (pp. 6-7, 8) and simply as a consequence of "their state of mind" (pp. 9-10). As set forth above with reference to the Government's motion, no such claim was ever made by appellants. The satisfaction of appellants' full priorities was admitted to be the real issue in the oral argument in the court below. And the latter admitted in its opinion that neither it nor the Commission purported to determine that issue and would not do so despite appellants' urging throughout these proceedings. The "state of mind" issue is not only a false one but it discloses—as has been patent throughout these proceedings—that appellees not only do not wish to meet the merits of this case but desire to obscure them from this Court.

The third and last argument of the carriers is equally evasive. First misstating the ruling in the *Otis* case (323 U. S. 624, 634), they argue on the basis of a Virginia decision under Virginia law despite the fact that appellants' rights arise and are being asserted under Michigan law. It is true of course that federal tribunals (here this Court, the court below, and the Interstate Commerce Commission) have jurisdiction, but shareholders (except those in federally created corporations) derive their status solely from the state law creating them so far as it does not conflict with any lawful federal requirements to the contrary. Here the Interstate Commerce Commission had to accept the shareholders as state law created them (Virginia, so far as Chesapeake & Ohio shareholders were concerned; Michigan, so far as Pere Marquette stockholders were concerned). It did so in determining which were common shareholders and which were preferred. It did so in determining the par value of their shares. It even did so in discussing the arrearages of Pere Marquette preferred.

The Commission inevitably gave effect to shareholders' status and rights under state law all along the line, except when it came to effectuating the accruals and prior equities of the Pere Marquette preferred. There, without explanation, it found itself powerless. It found itself not only powerless to correct the deficiency in the merger plan prepared by the jointly managed and controlled Marquette-Chesapeake-Ohio railroad but *it also found itself powerless either to reject or to condition that plan upon a due recognition of the rights of preferred shareholders in Pere Marquette.* It so concluded although the federal statute expressly gave it not only "exclusive" but "plenary" jurisdiction. It remitted appellants to some possible other tribunal in some other place. Whether—with respect to the shareholders' rights created by Michigan and under sections 5 and 20a of the federal Interstate Commerce Act—it was correct in finding itself thus impoverished is the issue

in this case. The statutes and decisions of Virginia have no more to do with it than those of Delaware or Poictesme.

CONCLUSION

In view of the manifestly groundless case presented by the Government's motion and the evasive arguments of the carriers, it is respectfully submitted that—if the judgment below cannot be reversed and remanded forthwith—the Court should note jurisdiction and determine the issue after receiving briefs and hearing argument.

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